

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

FILED  
DEC 14 2006  


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\*  
JOHN PAUL WINTERS, \* CIV 05-4020  
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\*  
Petitioner, \*  
\*  
\*  
-VS- \* ORDER  
\*  
DOUGLAS WEBER, Warden, \*  
\*  
South Dakota State Penitentiary, \*  
\*  
Respondent. \*  
\*\*\*\*\*

Plaintiff brings this pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Magistrate Judge issued a Report and Recommendation recommending that the Petition be denied with prejudice.

Petitioner filed no objections to the Report and Recommendation. After conducting an independent review of the record, the Court agrees with the Magistrate Judge. Specifically, Petitioner's habeas corpus claims were adjudicated on the merits after an evidentiary hearing in state court, where he was represented by court-appointed counsel. Petitioner has failed to satisfy his burden of rebutting the presumption of correctness of the state court's adjudication by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). The state court determination was not contrary to, nor did it involve an unreasonable application of clearly established federal law (Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)), and was a reasonable determination of the facts in light of the evidence presented in the state habeas proceeding. See 28 U.S.C. § 2254(d).

The Court finds Petitioner has failed to make a "substantial showing of the denial of a constitutional right" and thus a certificate of appealability will not be issued in Petitioner's case. 28 U.S.C. § 2253(c)(2). Although 28 U.S.C. § 2253(c)(2) has been found to be "only a modest standard," Petitioner has not shown that "the issues are debatable among jurists of reason; that a

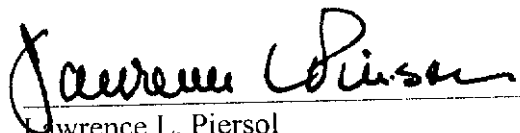
court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement or to proceed further.” Randolph v. Kemna, 276 F.3d 401, 403 n.1 (8<sup>th</sup> Cir. 2002) (citations omitted). Accordingly, it is hereby

ORDERED that:

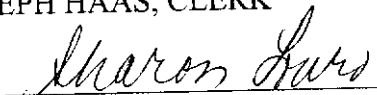
- (1) The Report and Recommendation (Doc. 24) is ADOPTED;
- (2) Petitioner’s Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 (Doc. 1) is DENIED with prejudice;
- (3) A Certificate of Appealability is DENIED;
- (4) Petitioner’s Motion to Proceed In Forma Pauperis (Doc. 18) is DENIED AS MOOT.

Dated this 14<sup>th</sup> day of December, 2006.

BY THE COURT:

  
Lawrence L. Piersol  
United States District Judge

ATTEST:  
JOSEPH HAAS, CLERK

BY:   
(SEAL) DEPUTY